The City of New York

POLICE DEPARTMENT

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In the Matter of the Disciplinary Proceedings	:	
- against -	:	FINAL
Police Officer Steve Terry	:	ORDER
Tax Registry No. 929244	:	OF
Military & Extended Leave Desk	:	DISMISSAL

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Police Officer Steve Terry, Tax Registry No. 929244, Shield No. 17952, Social Security No. ending in [redacted] having been served with written notice, has been tried on written Charges and Specifications numbered 2011-3687 as set forth on P.D. 468-121, dated February 17, 2011, and after a review of the entire record, has been found Guilty as Charged.

Now therefore, pursuant to the powers vested in me by Section 14-115 of the Administrative Code of the City of New York, I hereby *DISMISS* Police Officer Steve Terry from the Police Service of the City of New York.

RAYMOND W. KELLY
POLICE COMMISSIONER

EFFECTIVE: On March 12, 2012 @0001HRS.

The City of New York

POLICE DEPARTMENT

Febraury 6, 2012

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In the Matter of the Disciplinary Proceedings : Case No. 2011-3687

- against - :

Police Officer Steve Terry :

Tax Registry No. 929244 :

Military & Extended Leave Desk :

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At: Police Headquarters
One Police Plaza
New York, New York 10038

Before: The Honorable David S. Weisel
Assistant Deputy Commissioner – Trials

APPEARANCE:

For the Department: Mark Berger, Esq.
Department Advocate's Office
One Police Plaza – Suite 402
New York, New York 10038

For the Respondent: John Tynan, Esq.
Worth, Longworth & London LLP
111 John Street – Suite 640
New York, New York 10038

To:

THE HONORABLE RAYMOND W. KELLY
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NEW YORK 10038

The above-named member of the Department appeared before the Court on August 18, 2011, September 19, 2011, October 20, 2011, and November 2, 2011, charged with the following:

1. Said Police Officer Steve Terry, assigned to the Manhattan Court Section, on or about and between November 8, 2010 and February 8, 2011, did engage in conduct prejudicial to the order, efficiency or discipline of the Department in that said Police Officer wrongfully did ingest marihuana without police necessity or authority to do so.

P.G. 203-10, Page 1, Paragraph 5 PROHIBITED CONDUCT
GENERAL REGULATIONS

2. Said Police Officer Steve Terry, assigned to the Manhattan Court Section, on or about and between November 8, 2010 and February 8, 2011, did engage in conduct prejudicial to the order, efficiency or discipline of the Department in that said Police Officer wrongfully did possess marihuana without police necessity or authority to do so.

P.G. 203-10, Page 1, Paragraph 5 – PROHIBITED CONDUCT
GENERAL REGULATIONS

The Department was represented by Mark Berger, Esq., Department Advocate's Office. Respondent was represented by John Tynan, Esq., Worth, Longworth & London LLP.

Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

Respondent is found Guilty.

SUMMARY OF EVIDENCE PRESENTED

The Department's Case

The Department called Sergeant Michael Fealy and Michael Schaffer as witnesses.

Sergeant Michael Fealy

Fealy was assigned to the Internal Affairs Bureau (IAB). In February 2011, he investigated an allegation of criminal association involving Respondent. On February 8, 2011, Fealy, his immediate supervisor, and his commanding officer approached Respondent at a corner in Brooklyn and informed him that he was being placed on modified duty. They drove him to the Medical Division to collect samples for drug tests.

Respondent was being tested for cause after an arrested narcotics dealer alleged to have smoked marijuana with him repeatedly. The criminal association complaint was forwarded to IAB by the Civilian Complaint Review Board (CCRB). In an interview, the initial CCRB complainant told Fealy that he had observed Respondent associating with a known narcotics dealer on more than one occasion. In a subsequent interview, a second witness corroborated the complainant's statement.

At the time, the dealer was being investigated by the Narcotics Division. Fealy put out an I-Card for the dealer and was notified by the Narcotics Division when they arrested him. Fealy interviewed the dealer, who confirmed that "he does associate or he did associate with" Respondent. The dealer also said that he regularly delivered marijuana to Respondent, smoked marijuana with him on more than one occasion, and gave him money on a regular basis as a "retainer fee" "for protection."

In addition to being tested for cause, Respondent was arrested for official misconduct and bribe receiving.

Approximately one month before picking up Respondent, Fealy had received five hours of instruction on drug testing.

At the Medical Division, Respondent's identity was verified by looking at his identification card and taking his fingerprint. Respondent completed a Drug Screening Questionnaire, on which he indicated that he had taken no prescription medications within the last three months (see Department's Exhibit [DX] 1, Drug Screening Questionnaire, signed by Respondent & Fealy, dated Feb. 8, 2011).

Fealy escorted Respondent to the bathroom, where Fealy observed him urinate into a plastic container. The urine was then poured into two smaller containers, which were covered and sealed with tape. Fealy placed the containers into plastic security envelopes. Respondent initialed both the tape and the envelopes. The envelopes were then sealed in a mailer box and placed in a refrigerator. Respondent was present throughout this entire process.

Fealy also escorted Respondent to the "cutting room." Fealy observed a police officer that worked in the Medical Division wipe a table with bacterial wipes and cover the table in block paper. The officer then gave Fealy sterile scissors, which Fealy used to cut three hair samples from Respondent's head. Fealy explained that he took the samples from the back of Respondent's head, cutting as close to the scalp as possible. Fealy sealed the samples inside tinfoil envelopes, which Respondent signed. Each envelope was marked with Respondent's unique drug screening number. Fealy placed two of the samples inside a mailer envelope, and the third sample was secured in a locker at the Medical Division.

Respondent's two hair samples were sent to Psychemedics Corporation for testing; the urine samples were sent to Quest Diagnostics.

On cross examination, Fealy conceded that he could not recall exactly when the allegation that Respondent smoked marijuana was made. The initial CCRB complainant filed the complaint after he had been issued a summons by Respondent. Fealy conducted his interview of the complainant over the telephone. Fealy never met him in person nor did anybody else in IAB. When Fealy was asked at trial how he verified that he was speaking to the right individual, he explained that he ran a background check on the complainant before the telephone call and then verified the complainant's address and telephone number during the call.

Fealy admitted that the arrested drug dealer was facing significant time in prison and was cooperating with the District Attorney's Office.

At the time of Respondent's sample collection, Fealy had been assigned to IAB for approximately four months. It was the first time that Fealy had been involved in the collection of hair samples for a drug test. Approximately a half hour of Fealy's five-hour training involved practicing the collection process on a mannequin with a wig.

Before Respondent's samples were taken, he was offered the opportunity to resign. Respondent opted to go forward with the tests. Fealy wore gloves while he collected the samples. Both the urine samples and hair samples came back with positive results.

Upon questioning by the Court, Fealy testified that phone records showed over 30 calls between Respondent and the drug dealer during a period of approximately six months. The number 30 was an approximation as well.

Michael Schaffer

Schaffer had been the vice president of laboratory operations and the director of toxicology at Psychemedics since 1999. He was responsible for the day-to-day activity of the laboratory, which was licensed by the Food and Drug Administration (FDA) and had been performing hair tests since 1986. He was responsible for "the work that's done, setting up the protocols, reviewing the protocols, purchasing equipment, hiring personnel, everything that's involved in the day-to-day activity of ensuring that the laboratory is running well, the recording mechanisms go through the right protocols and procedures, and everyone follows the same standard operating procedure."

Schaffer held Bachelor of Science degrees in zoology and pharmacy, a Master of Science degree in pharmacognosy (the study of drugs derived from natural products), and a Ph.D. in toxicology. He had a laboratory license in clinical and forensic toxicology in three states, including New York. He was board-certified by the American Board of Forensic Toxicology and the National Registry of Clinical Chemists. In 2003, he received the American Academy of Forensic Sciences' Alexander O. Gettler Award for most outstanding practitioner of forensic toxicology. He had published papers and given presentations on the subjects of hair and urine drug testing. He taught a graduate course in forensic toxicology (see DX 7, curriculum vitae).

During the course of his career, Schaffer had personally conducted or overseen approximately five million hair tests and four to five million urine tests. He had been qualified in court as an expert in the forensic toxicology of hair and urine testing more than a thousand times.

The Court deemed Schaffer an expert for the instant case in the field of forensic toxicology, specifically with regard to drug testing of hair and urine.

Schaffer explained that when a person ingests marijuana, he is ingesting the parent compound of the drug, known as parent tetrahydrocannabinol, or parent THC. This enters the bloodstream and becomes metabolized. It is converted to a metabolite called carboxy THC. The circulatory system brings the carboxy THC to the base of the hair follicle, getting trapped in the keratin structure of the hair as it grows.

When Psychemedics receives hair samples, eight milligrams of hair are liquefied by enzymatic digestion and then analyzed by radioimmunoassay (RIA) using a prescribed cutoff level. The purpose of the cutoff is to distinguish intentional ingestion of the drug from situations of possible secondhand exposure.

If the initial sample is found to be at or above the cutoff level, a second sample is washed and analyzed by mass spectrometry (MS). After the MS, a certifying scientist reviews the process for quality assurance. Only if the MS analysis confirms the initial positive test result will the laboratory deem a sample to be positive for the presence of drugs in its final report.

The cutoff level used by Psychemedics and the Department in marijuana cases is one picogram of carboxy THC per ten milligrams of hair.

Schaffer reviewed DX 4, the Psychemedics laboratory data package, marked with Respondent's drug screening number. The package, which documented the chain of custody for Respondent's samples, showed that the first sample tested positive for carboxy THC at a concentration of 2.2 pg/10 mg and the second sample tested positive at a concentration of 2.4 pg/10 mg (see DX 2 & 3, test result pages of data package).

Respondent's samples were collected on February 8, 2011, and received by the laboratory two days later. The samples were 1.5 inches long, which would have represented approximately

three months of hair growth. According to Schaffer, Respondent's test results indicated that Respondent knowingly ingested marijuana on multiple occasions during that period.

Although Schaffer did not work for Quest, he used to work for a laboratory in Florida that had since been bought by Quest. Quest was the largest clinical laboratory in the country and had federal clearance to conduct drug testing. Schaffer was familiar with Quest's procedure for urine testing. Upon review of the documentation package that was prepared by Quest for Respondent's urine sample, Schaffer explained that the urine underwent immunoassay and MS testing, using a cutoff level of 15 nanograms of carboxy THC per milliliter of urine. Respondent's urine sample tested positive for carboxy THC at a concentration of 28 ng/10 mL. According to Schaffer, this result indicated that Respondent ingested marijuana within three weeks of the sample collection date (see DX 6, Quest documentation package; DX 5, result page for urine testing).

On cross examination, Schaffer testified that carboxy THC was produced only through the metabolizing of ingested marijuana in the liver. It was possible for marijuana oil to be absorbed into the body through the skin if marijuana was smoked in cigarette form. If someone were exposed to parent THC, however, "that is not carboxy THC that is not going to do anything. . . . [I]f you were present at a rock concert or in a room it wouldn't make any difference if you even got it on your hands it would not make any difference" because it had not been metabolized. The Psychemedics employees that handled hair samples did not wear gloves. Laboratory workers were themselves subject to random drug testing. No worker had ever tested positive since Schaffer started working there.

Respondent's Case

Respondent testified on his own behalf.

Respondent

Respondent, a ten-year member of the Department, was previously assigned to the 63 Precinct. There, he had occasion to deal with individuals using narcotics. He made arrests for drug possession and sales.

At one point, while on his way to a conditions post at the Kings Plaza mall, Respondent responded to a landlord-tenant dispute on East [redacted] Street after being flagged down. The tenant could not get into his home because of debris and trash left in front of the doorway. This was at least partially a commercial building. After Respondent affixed two Environmental Control Board summonses to the landlord's door, the landlord came to Respondent's command and alleged that Respondent had bought marijuana from the tenant. Respondent stated that after this incident, he did speak briefly to the tenant on occasion because the tenant was afraid. There was an open complaint report made by the tenant against the landlord for menacing.

As Respondent was leaving his girlfriend's house to go to work on February 8, 2011, he was stopped by members of IAB and informed that he was being drug-tested for cause. During the course of his career, he had been the subject of drug screening on four or five prior occasions, but this was the first time that he was tested for cause. On that day, he was brought to the Medical Division. He asked to go to the bathroom; the request was denied.

Respondent filled out forms and provided a urine sample. After Respondent signed something that was placed on top of the urine sample container, Fealy brought him to another room to collect hair samples. While he was seated in a chair facing forward, he heard Fealy

behind him asking a Medical Division member how to cut the hair. That member showed Fealy how to collect the samples properly. According to Respondent, Fealy nicked his scalp with the scissors.

At the time, Respondent regularly used two different kinds of hair gel. He explained that he started using the gels approximately seven months earlier at his barber's recommendation after his hair began to fall out. He purchased the gels at African stores, and he did not realize at the time that they contained "active marijuana." He did not note the gels on his Drug Screening Questionnaire because the questionnaire asked specifically about food and medicine that he had recently ingested, and he did not consider the gels to fall into either of those categories.

RX C and D were exemplar jars of the products used by Respondent: Kuza Lite Indian Hemp Hair and Scalp Conditioner, and Kuza 100% Indian Hemp Hair and Scalp Treatment, respectively.

When Respondent was subsequently informed that he tested positive for marijuana, he could not believe it. He had never used marijuana or any type of controlled substance. He never socialized with people who smoked marijuana, nor did he ever purchase marijuana. On March 14, 2011, Respondent went to a Quest laboratory in Brooklyn and provided a new hair sample from the same area of the head that the original samples were taken (the back of the head). The test on this sample came back with negative results (see Respondent's Exhibit [RX] A, custody and control form; RX B, results page).

On cross examination, Respondent confirmed that he never notified the Department that he might have accidentally ingested marijuana. Although he knew that the Medical Division kept a third hair sample and second urine sample available for testing, he opted after speaking

with his lawyer not to have those samples tested. He denied that this decision was based on a belief that the samples would be positive.

Respondent learned of his positive results on February 15, 2011. He reiterated that he, nevertheless, waited until March 14, 2011, to undergo independent testing. About the sample collection process on that day, Respondent agreed that neither his address nor his fingerprint appeared on the paperwork. Respondent saw the collector seal the hair in an envelope. Although he paid for the test to have a three-month look-back window, nowhere on the paperwork was there any indication of the length of the sample. He did not know whether a cutoff level was used for the testing. He was informed by Quest that data packages were not released in cases of negative results.

After being informed of the positive Psychemedics results, Respondent stopped using the hair gels because he "couldn't understand why I would test positive for marijuana." He then conducted research on the hair gels. He then said that when he learned that the gels contained parent THC, he stopped using them. Respondent explained that because he did not use drugs, the hair product was the only possible explanation for the positive results. He came to the belief that the gels caused the positive results "after I stopped using it. When I started looking through the hair stuff that I was putting in my hair." He came to this conclusion even though THC was not listed as an ingredient on the gel jars. Respondent admitted, however, that he "testified or . . . gave a statement" on June 22, 2011, that he had no explanation for his test results (the Advocate stated on summation that this was Respondent's official Department interview).

The Department's Rebuttal Case

The Department recalled Schaffer on rebuttal.

Michael Schaffer

Schaffer testified that neither of the gels used by Respondent contained *Cannabis sativa*, the marijuana plant, also referred to both as cannabis or sativa. The gels did contain Indian hemp, or apocynum, also known as dog bane because of its extreme toxicity to dogs. Apocynum was similar to cannabis but did not contain parent THC. Ingestion of apocynum would, therefore, not produce the carboxy THC metabolite in the human body.

Schaffer explained that the term "hemp" referred to any plant that could be used to make rope or twine. This included both cannabis and apocynum. Even assuming that the Indian hemp hair gels were contaminated with cannabis and thus with actual parent THC, however, it would not have been possible for Respondent to ingest the quantity of gel necessary to trigger his positive hair test results of 2.2 and 2.4 pg. The apocynum was so toxic that death or at least great bodily harm would result.

Merely placing the gels on the hair did not constitute ingestion, Schaffer testified. There were extensive washing procedures done by Psychemedics to control for any possibility of contamination with parent THC.

Schaffer concluded that it was not possible for Respondent's hair gels to cause the positive test results.

Upon review of the Quest paperwork for the March 14, 2011, sample collection, Schaffer testified that it provided no chain of custody information for after the sample was collected. In addition, there was a label for Respondent to initial that went uninitialed.

According to Schaffer, a laboratory data package was always available for all tests irrespective of the test results. He explained that seeing a data package would be useful since a negative result did not necessarily mean that no drugs were found in a sample. All it meant was that the cutoff levels were not reached. Schaffer testified that after an individual tested positive for marijuana, the industry standard was to re-test at the limit of detection. That was not done during the March test. It was possible that carboxy THC was present in the March sample but the test results were negative nonetheless because a cutoff level was not reached.

On cross examination, Schaffer testified that if sativa were present in the hemp oil contained in the gels, it would be possible for parent THC to be absorbed into the skin of the scalp. Some hemp oil, which was made from the seeds of the plant, contained a small amount of parent THC.

On re-direct examination, Schaffer stated that it was illegal to sell products that contained cannabis. On re-cross examination, Schaffer testified that Psychemedics had tested most over-the-counter hair products that contained cannabis-related ingredients, and probably the Kuza hair gels as well. None of them came back as containing parent THC.

Upon questioning by the Court, Schaffer confirmed that if an individual went to a Quest retail location, said that he had tested positive for marijuana, wanted a confirmatory re-test using the limit of detection standard, and was willing to pay, Quest would perform the test.

Schaffer testified that although hemp oil "when it first came out did contain parent THC," it had been "removed from the market" by the FDA and the Drug Enforcement Administration (DEA). "[I]t doesn't exist anymore," Schaffer said.

FINDINGS AND ANALYSIS

Respondent is charged with possessing and ingesting marijuana without police necessity or authority after a test revealed the presence of marijuana in his hair. The test was performed for cause after a complainant and a second witness told the Internal Affairs Bureau that Respondent had smoked marijuana with a drug dealer. Respondent also allegedly had been provided with marijuana by that dealer.

For-Cause Testing

The Department was extraordinarily circumspect about the nature of the cause leading to the drug test. The IAB investigator, Fealy, stated that an individual made a CCRB complaint alleging that Respondent was associating with a drug dealer. A second witness told Fealy that he had also seen Respondent associating with this alleged dealer. Fealy testified that Respondent had issued a summons to the original CCRB complainant, but refused, upon the Advocate's instruction, to answer what the summons was for.

The matter was transferred from CCRB to IAB. Fealy never met the complainant in person, and no one else from IAB had either, but Fealy spoke to him on the phone. He confirmed that he was speaking to the right person by doing a background check on the complainant and asking his address and phone number during the call.

Fealy testified that the complainant said he had observed Respondent "associating with a known narcotics dealer on more than one occasion." It was not clear whether this meant that the complainant knew the individual was a narcotics dealer, or whether Fealy learned this by conferring with the Narcotics Division. In any event, Narcotics told Fealy that they had already been investigating the dealer. The dealer subsequently was arrested and Fealy was notified.

The dealer told Fealy that he had delivered marijuana to Respondent, smoked it with him on more than one occasion, and regularly gave cash to Respondent as, in the dealer's words, "a retainer fee," i.e., protection money. Fealy testified that the dealer was cooperating in the criminal case against Respondent for bribe receiving and receiving an award for official misconduct in an effort to reduce the dealer's own criminal exposure.[1]

Fealy testified that he determined that Respondent had not arrested the dealer in the past. There were, however, over 30 phone calls between Respondent and the dealer over perhaps a six-month period.

Respondent's testimony apparently fleshed out many of the details that the Advocate failed to provide to the Court, at least from Respondent's own perspective. Respondent denied ever using drugs. He stated that he was assigned to the 63 Precinct and performed a conditions post at the Kings Plaza mall. A tenant on East [redacted] Street flagged him down on the way to the mall. There had been numerous calls at that location in the past. The tenant complained to Respondent that because of debris and trash in his doorway, he could not get inside. Respondent issued two Environmental Control Board summonses to the landlord. Respondent also was aware that there was an open complaint report by the tenant against the landlord for menacing.

When Respondent returned to the 63 Precinct station house, he was told by officers that the landlord came and made a complaint that Respondent was buying marijuana from the tenant. Respondent "briefly" spoke with the "afraid" tenant after that.

Respondent's testimony, if accurate as to the persons involved, begs the question of why the Department did not provide these routine details. The unanswered queries were being asked because Respondent raised the issue of whether there was a sufficient basis to test for cause.

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[1] Counsel for Respondent stated at trial that he represented Respondent in the criminal case, was in possession of the indictment, and was aware of the names of individuals involved.

Respondent argued that there was insufficient cause to test him for drug use, and it is an issue that this Court must address. See Rules of the City of N.Y., Title 38, § 15-02 (Deputy Commissioner of Trials has jurisdiction over Department disciplinary matters, including "authority to render any ruling or order necessary and appropriate for the efficient adjudication of disciplinary proceedings instituted against civilian and uniform members of the Department"); Matter of Partland v. Bratton, 247 A.D.2d 261, 262 (1st Dept. 1998) (hearing officer for Department properly determined that reasonable suspicion provided cause for drug test); *Case No. 72662/97*, Mar. 4, 1998, p. 16 (addressing existence of reasonable suspicion). A sufficient record was established for the Court to do so.

A public employer may test an employee for drugs upon reasonable suspicion that he is using drugs. See Wilson v. City of White Plains, 95 N.Y.2d 783, 784 (2000). Whether sufficient reasonable suspicion exists to order an employee to take a drug test is based upon the totality of the information known to the supervisor that orders the test, at the time the order is issued. See *Case Nos. 78236/02 et al.*, Apr. 27, 2003, p. 14.

In the instant case, Fealy was told by two people, the CCRB complainant and a second witness, that Respondent was associating with a drug dealer. Fealy verified that this other individual was, in fact, being investigated by Narcotics. The dealer admitted to Fealy that he had delivered marijuana to Respondent, smoked it with him on more than one occasion, and regularly gave protection money to Respondent. Fealy corroborated some of this information by noting that a large number of phone calls had been made between Respondent and the dealer. This was sufficient to constitute reasonable suspicion under the circumstances. See Matter of Roy v. City of N.Y., 258 A.D.2d 348 (1st Dept. 1999) (informant's statement that she had seen officer using drugs on several occasions was reasonably detailed and included a declaration against penal

interest, constituting reasonable suspicion for drug-test order); Matter of Allen v. Police Dept., 240 A.D.2d 229, 230 (1st Dept. 1997) (information supplied by informant, corroborated by other events observed by investigators, provided reasonable suspicion to order testing); Matter of McCullon v. Meehan, 150 A.D.2d 578 (2d Dept. 1989) (urinalysis order for Transit Police Department officer was predicated on reasonable suspicion of drug use based on information supplied by confidential informant).

Collection of the Samples

Respondent argued that Fealy, an IAB investigator and not a Medical Division member, was insufficiently trained to collect hair samples. Fealy testified that as part of an IAB course, he received about a half-day of instruction "specifically on hair testing." A portion of the class included "hands on practicing" for hair samples using a wigged mannequin. This took about 30 minutes of class time. When Fealy took the samples from Respondent's head, he wore gloves. A Medical Division employee wiped down the table. The scissors came sterilized. Fealy packaged both the hair and urine samples. From his testimony, this appeared to involve no more intricacy than vouchering any other item of evidence as would be done in the normal course of business by a police officer.

In opposition, Respondent claimed that Fealy had to ask the Medical Division officer how to cut the hair. Even after Fealy did so, he nicked Respondent with the scissors.

Even if Respondent's claims were true, the Court does not see how that would change the results of the test. Schaffer testified that the samples received were 1.5 inches in length, constituting the three-month look-back period. Thus, Fealy took the samples correctly. Any blood would have been removed during the washing procedure.

The evidence, therefore, demonstrates the speculative nature of Respondent's contention that Fealy's sample collection might have led to an invalid result. Accordingly, the Court rejects it. Cf. *Case No. 81240/05*, Apr. 24, 2006, p. 67 ("It is abundantly clear" that officer's "head hair was carefully cut, packaged and sealed, by the Department, under a clean environment"), confirmed sub nom. Matter of Friscia v. Kelly, 51 A.D.3d 451 (1st Dept. 2008); *Case No. 70714/96 et al.*, Jan. 16, 1997, p. 42 ("[T]he Department amply proved that the samples were carefully obtained using a licensed laboratory's procedures"), confirmed sub nom. Matter of Brinson v. Safir, 255 A.D.2d 247 (1st Dept. 1998) (neither mistake in transcription of subject identification number, nor placement of test tubes in centrifuge leading to re-test, affected accuracy of test results, and there was "otherwise no basis in the record to disturb [the] determination regarding the accuracy of the tests performed").

Evidence of Ingestion and Possession

Dr. Michael Schaffer of the Psychemedics Corporation testified that when marijuana is ingested, it metabolizes in the liver. The metabolite, carboxy THC, is then fed to the hair through the bloodstream, where it becomes trapped in the keratin hair structure. Schaffer testified that carboxy THC can only be present as a result of the metabolism of marijuana by the organs of the human body. Schaffer stated that carboxy THC was present in Respondent's hair and urine at levels above the mass spectrometry cutoff. Schaffer testified that the results meant that Respondent knowingly ingested marijuana on multiple occasions during the look-back period covered by the test, approximately 90 days back from February 8, 2011, when the hair was collected. This is the period charged in the specifications: November 8, 2010, to February 8, 2011.

Respondent denied ever using drugs. He testified, however, that he began using certain hair gels when he noticed he was going bald. He provided exemplars of these products, Kuza treatment and conditioner for hair and scalp (see RX C & D). These products listed Indian hemp as an ingredient. Respondent asserted that they contained parent THC. He used them on a regular basis for about six or seven months, but had stopped recently. They could be purchased at stores selling African items. He did not list them on the screening questionnaire at the Medical Division (see DX 1) because he did not consider them to be food or medicine.

On rebuttal, however, Schaffer testified that Indian hemp was not the same thing as marijuana. Marijuana, Schaffer testified, came from the *Cannabis sativa* plant. Indian hemp, on the other hand, was apocynum. Schaffer testified that apocynum was toxic if eaten, noting that it was also known as dog bane because it was so poisonous to dogs (the name apocynum comes from Greek and literally means "away dog"). Schaffer testified that apocynum did not contain parent THC, and its ingestion could not lead to the production in the body, through metabolization, of carboxy THC.

Respondent's counsel pointed out that one of the Kuza gels contained hemp oil, which was made from hemp seeds. While it was possible for hemp oil to be produced from cannabis seeds, and thus to contain parent THC, Schaffer testified that the FDA and DEA had banned the sale of cannabis products. Although Respondent's counsel alleged that the products were sold in stores that did not necessarily adhere to federal government standards, this is a speculative argument. The jars look like any other hair product sold in national pharmacy chains. They have similar corporate and ingredient markings to items produced by, as counsel put it, Procter & Gamble.

Respondent also put forward evidence of an independent hair test. On the advice of his attorney, he declined to have his other Medical Division samples independently tested. Instead, one month after he was informed that his Psychemedics tests came back positive, Respondent went to a Quest Diagnostics center, where his hair was taken. He later received a report stating that he had tested negative for marijuana (see RX B).

Schaffer's testimony established that Respondent deliberately ingested marijuana. The two Psychemedics tests demonstrated that the amount of carboxy THC in Respondent's hair was between 2.2 and 2.4 pg per 10 mg of hair. The urine sample sent to Quest Diagnostics showed a carboxy THC level of 28 ng per milliliter of urine. The Quest report for the hair test taken upon Respondent's initiative in March 2011 stated only that the test was negative. As Schaffer pointed out, there was no showing whether the hair was tested at the limit of detection, which would have been the proper thing to do when re-testing a donor that had previously tested positive. This would be so that the re-test could determine if even the minutest amount of carboxy THC was present. The March result therefore did not mean that there was no carboxy THC in the sample; it just meant that the result was below the cutoff. This is important because it was taken over a month after the original samples. Respondent could have abstained from marijuana use after the original sampling or the original results came back, leading, five weeks later, to a result that was below the cutoff but still containing carboxy THC. The report in evidence from Respondent does not state whether this was a negative result after initial screening, or if it was below the mass spectrometry cutoff.

Respondent's argument about his March test was, as the Department pointed out, internally inconsistent. Respondent stated that he did not know that the Kuza products contained parent THC until he researched the issue a few days later. He also said, however, that he ceased

using Kuza immediately upon hearing of the results. If he learned that the Kuza products caused the positive results only several days after receiving those results, there would have been no reason for him to stop using them the second he got the results.

Moreover, Respondent admitted stating during his official Department interview in June 2011 that he had no idea why he tested positive. That directly contradicts his claim that he discovered a few days after he received the original positive results in February 2011 that the gels contained parent THC.

Accordingly, the Court rejects Respondent's arguments and finds that the Department proved through the Psychemedics hair and Quest urine test results that Respondent ingested, and thus possessed, marijuana. See Matter of McBride v. Kelly, 215 A.D.2d 161 (1st Dept. 1995) (substantial evidence that officer ingested cocaine was provided by immunoassay and mass spectrometry). Because the Department demonstrated that the Respondent ingested and thus possessed marijuana, without any police necessity or authority, the Court finds him Guilty.

PENALTY

In order to determine an appropriate penalty, Respondent's service record was examined. See Matter of Pell v. Board of Education, 34 N.Y.2d 222, 240 (1974). Respondent was appointed to the Department on July 2, 2001. Information from his personnel folder that was considered in making this penalty recommendation is contained in the attached confidential memorandum.

Respondent has been found Guilty of the possession and ingestion of marijuana without police necessity or authority. This Department has a strong interest in not employing persons who ingest and possess illegal drugs like marijuana. Accordingly, the Court recommends that

Respondent be DISMISSED from employment with the Department. See *Case No. 81455/05*, signed Aug. 3, 2007 (23-year member terminated from the Department for possessing and ingesting marijuana), confirmed sub nom. Matter of Chiofalo v. Kelly, 70 A.D.3d 423 (1st Dept. 2010).

Respectfully submitted,

David S. Weisel
Assistant Deputy Commissioner Trials

APPROVED
MAR 12 2012
RAYMOND W. KELLY
POLICE COMMISSIONER

POLICE DEPARTMENT
CITY OF NEW YORK

From: Assistant Deputy Commissioner Trials

To: Police Commissioner

Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER STEVE TERRY
TAX REGISTRY NO. 929244
DISCIPLINARY CASE NO. 2011-3687

In 2009 and 2010, Respondent received an overall rating of 4.0 "Highly Competent" on his annual performance evaluation. He was rated 4.5 "Extremely Competent/Highly Competent" in 2008. He has been awarded two medals for Excellent Police Duty and one Commendation. In his nearly 11 years of service, [redacted].

Respondent had been the subject of one prior adjudication. In 2006, he was charged with engaging in conduct prejudicial to the good order, efficiency and discipline of the Department by failing to identify himself as a member of the service when approached by detectives who were looking for [redacted], who was wanted for robbery. The charge was ultimately dismissed with Respondent receiving a Schedule "B" Command Discipline instead. For this misconduct, he forfeited ten vacation days. Furthermore, he was placed on Level-II Force Monitoring in November 2007.

For your consideration.

David S. Weisel
Assistant Deputy Commissioner – Trials